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UNITED STATES DISTRICT COURT

**DISTRICT OF NEVADA**

12 REO BOREN, ) 3:09-cv-00731-HDM-WGC  
13 Plaintiff, )  
14 vs. ) ORDER  
15 BARRY, BYBEE, BRACKBILL, )  
CARRASCO, COLEMAN, COSTNER, )  
16 HOLLINGSWORTH, JACOBY, KIRCHEN, )  
MARTIN, PEREZ, PERKINS, RAMSEY, )  
17 ROMERO, SAUNDERS, SCHMIDT, SMIT, )  
and JOHN DOES, )  
18 Defendants. )  
19 )

20 The court has considered the report and recommendation of the  
21 United States Magistrate Judge (#134) filed on July 9, 2012, in  
22 which the magistrate judge recommends granting the defendants'  
23 motion for summary judgment and giving the plaintiff notice of  
24 intent to dismiss the unserved defendants. No objections to the  
25 report and recommendation have been filed, and the time for doing  
26 so has expired.

27 The court has considered the pleadings and memoranda of the  
28 parties and other relevant matters of record and has made a review

1 and determination in accordance with the requirements of 28 U.S.C.  
2 § 636 and applicable case law, and the court hereby accepts and  
3 adopts in part and rejects in part the report and recommendation of  
4 the United States Magistrate Judge (#134).

5 As an initial note, plaintiff's opposition and supplemental  
6 opposition cite eleven exhibits (including one group of exhibits),  
7 but not all of the exhibits are attached. The magistrate judge  
8 declined to consider those exhibits that had not been attached to  
9 plaintiff's oppositions or identified by location. The group of  
10 exhibits - "defendants exhibits 1 thru 19" - is not germane to any  
11 claims remaining in this action. However, the four other,  
12 unattached exhibits - the statements written by Gray, Stradley,  
13 Parks, and Shea - do touch upon plaintiff's claims. All four  
14 exhibits were attached not only to plaintiff's second amended  
15 complaint but also to defendants' reply. The court therefore  
16 considers all exhibits cited by plaintiff in opposition to summary  
17 judgment, including those that were not attached to the  
18 oppositions.

19 The court adopts and accepts the report and recommendation  
20 except with respect to plaintiff's excessive force claim stemming  
21 from the July 23, 2009, incident. As to that claim, the court  
22 finds there is sufficient evidence in the record to create a  
23 genuine issue of material fact, and summary judgment on that claim  
24 must therefore be denied.

25 As to the July 23, 2009, excessive force claim, the magistrate  
26 judge recommended granting summary judgment on the grounds that the  
27 plaintiff relied only on the conclusory allegations of his  
28 complaint and did not produce any evidence. However, Thomas Shea

1 states in a letter that on July 23, 2009, he observed the  
 2 following:

3 [W]hile walking Mr. Boren just past the slider door and  
 4 to the stairs, the c/o's all of a sudden dropped Mr.  
 5 Boren right there on the tier. His head hit the ground  
 6 with a horrific thud and while completely shackled, hands  
 7 behind the back and feet, one of the c/os was doing his  
 8 best to contort Mr. Boren's wrist & arms, while in cuffs,  
 9 face down on the ground[.] I could also see the c/o  
 10 contorting Mr. Boren[']s arms, with elbow and forearm on  
 11 the back of his neck, the c/o was kneeing Mr. Boren in  
 12 the face for several moments until CERT finally arrived.  
 13 Mr. Boren showed no reluctance, there was no resistance  
 14 or defiance. . . .

15 (Pl. Sec. Am. Compl. Ex. 2 (Shea Letter)).<sup>1</sup> In addition, plaintiff  
 16 asserts in his complaint that he was taken to the floor while his  
 17 arms and legs were shackled after he made a comment about  
 18 Hollingsworth's hair pattern. If believed by the jury, these  
 19 allegations could support an inference and finding that  
 20 Hollingsworth was acting in response to plaintiff's comments, and  
 21 not to any aggressive behavior by the plaintiff, and that he  
 22 therefore used force maliciously and sadistically for the purpose  
 23 of causing harm. While the court recognizes that Hollingsworth has  
 24 provided a different version of events,<sup>2</sup> the plaintiff has  
 25 presented sufficient evidence to create a genuine issue of material  
 26 fact as to whether Hollingsworth employed excessive force on July  
 27 23, 2009. Construing all evidence in favor of the plaintiff, as  
 28 the court is required to do at this stage of the proceedings,

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<sup>1</sup> The declaration of Seville Parks also states that he has "personal knowledge" that plaintiff was taken to the floor in full restraints for "no reason whatsoever," and that plaintiff did not attempt to harm or strike the defendants during the incident. (Pl. Sec. Am. Compl. Ex. 4). However, it is unclear whether Parks actually observed the incident.

<sup>2</sup> Defendants have included a video associated with this claim, but it does not show the actual incident, only the aftermath.

<sup>1</sup> summary judgment must therefore be denied on that claim.<sup>3</sup>

The remainder of the magistrate judge's report and recommendation should be affirmed even if the court considers the evidence the magistrate judge declined to consider.

Much of John Gray's declaration is not relevant to plaintiff's claims, but it does contain assertions that he personally observed plaintiff being denied meals, that defendant Bybee had once lied about a specific incident of plaintiff throwing his tray of food, and that plaintiff often told Gray how hungry he was. (Pl. 2d Am. Compl. Ex. 3 (Gray Decl.)). However, Gray does not state that plaintiff was refused meals when he asked for them or when he complied with distribution requirements. In fact, the evidence in the record clearly demonstrates that the only times plaintiff did not receive meals was when he either refused them or refused to comply with meal distribution orders and regulations. Further, the evidence shows that plaintiff regularly purchased food from the canteen, and that he was doing so because he did not want to eat the prison food. (See Def. Mot. Summ. J. Exs. C(h) & C(i) (plaintiff's grievances complaining about restricted access to the canteen)). A mere scintilla of evidence is insufficient to create a genuine issue of material fact on plaintiff's claim that he was denied meals. See *British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 952 (9th Cir. 1978). The magistrate judge therefore correctly concluded that summary judgment should be granted on plaintiff's

<sup>3</sup> While defendants' motion for summary judgment broadly asserts qualified immunity, the discussion is limited to plaintiff's claims for deliberate indifference and does not address plaintiff's claims based on excessive force. (See Def. Mot. Summ. J. 24-25). Accordingly, Hollingsworth has not raised qualified immunity in defense of this claim.

1 claim of deliberate indifference based on the deprivation of meals.

2 Mark Stradley's declaration relates only to the alleged use of  
3 excessive force on November 6, 2008. (Pl. 2d Am. Compl. Ex. 1  
4 (Stradley Decl.)). Because the sole defendant named in connection  
5 with this claim has already been dismissed for failure to timely  
6 serve, this claim may not proceed regardless of what Stradley's  
7 declaration says.

8 Finally, Seville Parks' affidavit does not provide any support  
9 to plaintiff's claims.

10 In accordance with the foregoing, the report and  
11 recommendation of the United States Magistrate Judge is adopted in  
12 part and rejected in part. The defendants' motion for summary  
13 judgment is **DENIED** as to plaintiff's July 23, 2009, excessive force  
14 claim against Hollingsworth. Plaintiff's claim based on the  
15 November 6, 2008, incident, which named only defendant "Ringney,"  
16 is dismissed without prejudice. The motion is **GRANTED** in all other  
17 respects. Accordingly, the claims against defendants Barry,  
18 Brackbill, Bybee, Carrasco, Coleman, Costner, Kirchen, Martin,  
19 Perez, Ramsey, Romero, Saunders, Schmidt, and Smit, and all claims  
20 against Hollingsworth except for the claim of excessive force based  
21 on the July 23, 2009 incident, are dismissed with prejudice. The  
22 court will give notice of intent to dismiss the unserved defendants  
23 without prejudice in a separate order.

24 **IT IS SO ORDERED.**

25 DATED: This 31st day of August, 2012.

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28 UNITED STATES DISTRICT JUDGE